of the Lord Ordinary should be recalled, that the claim of Mrs Murray and Miss Murray should be repelled, and that the case should be remitted to the Lord Ordinary with findings to that effect.

LORD DEAS was absent.

The Court pronounced this interlocutor :—

"The Lords having heard counsel on the reclaiming-note for Evan Fraser (Baird's trustee) against Lord Adam's interlocutor of 8th March 1882, Recal the interlocutor: Repel the second plea-in-law stated for the claimants Mrs Catharine Murray and Miss Frances B. Murray in so far as not already disposed of by the Lord Ordinary's interlocutor of date 5th July 1882 : Remit to the Lord Ordinary to proceed further in the cause: Find the reclaimer entitled to the expenses hitherto incurred in the cause, excepting the expenses incurred between 5th July 1882 and 8th March 1883; and remit to the Auditor to tax the amount of the expenses now found due, and report to the Lord Ordinary, and empower his Lordship to decern for said expenses when taxed, and decern."

Counsel for Evan Fraser (Reclaimer)—Baxter—Dickson. Agent—Alexander Wardrop, L.A.

Counsel for Mrs Murray and Miss Frances B. Murray (Respondents)—Lord Advocate (Balfour, Q.C.)—Pearson. Agents—Hope, Mann, & Kirk, W.S.

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*Wednesday, November 21.*

## FIRST DIVISION.

### ABEL v. WATT.

(See *Stewart* v. *M'Bey*, *ante*, vol. xx. p. 580.)

*Bankruptcy—Sequestration—Bankruptcy (Scotland) Act* 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 103 *—Discharge of Trustee—Acquisition of Property by Bankrupt prior to his Discharge, but subsequent to that of Trustee—Acquiescence of Creditors.*

The estates of a bankrupt were sequestrated in 1863 and yielded no dividend. In 1870 the trustee was discharged. The bankrupt thereafter, without interference on the part of the creditors, carried on trade as a farmer, horse-dealer, and carter for many years. In 1883, after decree of *cessio* had been obtained against him at the instance of a creditor, one of the creditors in the old sequestration presented a petition for the appointment of a new trustee, on the narrative that the bankrupt had acquired heritable property, and also that he was possessed of some farming implements and furniture. *Held* that the creditors in the old sequestration were barred by acquiescence from insisting in their right to this estate, to the exclusion of subsequent creditors.

*Process—Remit to Lord Ordinary on the Bills—Vacation—Jurisdiction.*

In a petition for the appointment of a new trustee in a sequestration—*held* that it is unnecessary to remit to the Lord Ordinary on the Bills to appoint a meeting of creditors, unless it should be necessary to do so for the purpose of allowing the petition to proceed in vacation.

Section 103 of the Bankruptcy (Scotland) Act 1856 provides—"If any estate, wherever situated, shall after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee as at the date of the acquisition thereof or succession for the purposes of this Act; and the trustee shall, on coming to the knowledge of the fact, present a petition setting forth the circumstances to the Lord Ordinary, who shall appoint intimation to be made in the *Gazette*, and require all concerned to appear within a certain time for their interest, and after the expiration of such time, and no cause being shown to the contrary, the Lord Ordinary shall declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee as at the date of the acquisition thereof or succession thereto," &c.

This petition was presented by John Abel, cattle-dealer, Strawberry Bank, Aberdeen, a creditor on the sequestrated estates of Alexander M'Bey, late farmer, Foveran, residing at Newburgh, Aberdeen, for the appointment of a new trustee in the sequestration.

The petition set forth that the estates of M'Bey, the bankrupt, were sequestrated by the Lord Ordinary officiating on the Bills on 6th July 1863, in terms of the Bankruptcy (Scotland) Act 1856, and that on 17th July 1863 David Kinnear, accountant in Edinburgh, was elected trustee thereon; that the petitioner was at the time of that sequestration a creditor of M'Bey to the extent of £99, 19s.; that the realised funds being insufficient to pay any dividend, the trustee was discharged in 1870; that the bankrupt had not been discharged; that the petitioner had recently become aware of the fact that the bankrupt in the beginning of 1882 feued a piece of ground at Newburgh, near Aberdeen, and built a house thereon, which was valued at £800, and on which the bankrupt obtained a loan of £500; that the lenders got an absolute title to the property direct from the superior with M'Bey's consent, dated 9th and 13th March 1882, and granted a back-letter to him, dated 15th and 27th March 1882, stating that they held the property in security for the loan of £500 and interest. Besides this reversion of £300, the petitioner stated that he had become aware that the bankrupt had household furniture and farming implements to the value of about £35.

Answers were lodged to this petition by John Stewart Watt, solicitor, Aberdeen, trustee for the creditors of Alexander M'Bey in a process of *cessio*, in which decree ordaining him to execute a disposition *omnium bonorum* for behoof of creditors was pronounced on 9th July 1883. It was stated in these answers that since the discharge of the trustee in the sequestration the bankrupt had not only, without interference on the part of the creditors, but with their full knowledge and acquiescence, embarked, within the county of Aberdeen, in the immediate neighbourhood of Foveran, in trade as a farmer,

horse-dealer, and carter, and had continued therein for many years, and that the creditors had thereby barred themselves from insisting in any right of participation in any acquisitions of the bankrupt during that period.

In the prayer of the petition the Court were craved "to remit to the Lord Ordinary officiating on the Bills to appoint a meeting of the creditors of the said Alexander M'Bey, to be held at such time and place as your Lordships may fix, to elect a trustee," &c. The Court held that there was no need to remit to the Lord Ordinary on the Bills except to proceed in vacation, and accordingly on 10th July 1883 they remitted for that purpose, the cause not being thereby removed from the Inner House.

Argued for the petitioner—This estate fell *ipso jure* under the old sequestration in terms of section 103 of the Bankruptcy Act, and a new trustee should therefore be appointed to administer it for behoof of the creditors in that sequestration to the exclusion of all whose claims were subsequent—*Gentles*, November 22, 1870, 9 Macph. 176; *Russell and Christie*, January 15, 1867, 5 Macph. 282; *Thomson*, December 17, 1863, 2 Macph. 325.

Argued for the respondents—The creditors here were barred by their acquiescence for so long a period from now insisting in their claim. This was not the kind of estate intended to be carried by section 103. The sequestration was closed except against unexpected events—*Barron* v. *Mitchell*, July 8, 1881, 8 R. 933; *Taylor* v. *Charteris and Andrew*, November 1, 1879, 7 R. 128; *Mein* v. *Turner*, February 15, 1855, 17 D. 435; *Christie* v. *Lowden*, December 19, 1835, 14 S. 191.

At advising—

Lord President—In this case M'Bey's sequestration was in 1863, and the whole estate then belonging to him was realised and divided among his creditors, his trustee being discharged in the year 1870. Since that date there has been no application to revive the sequestration, and it was only on the 7th of July last that the petitioner presented the present application, proceeding on the allegation that since the discharge of the trustee the bankrupt has acquired property which was not dealt with in the sequestration, and which has not been divided among his creditors. It is said that he has become possessed of heritable property, consisting of a house worth about £800, with a burden upon it of £500, so that there is a reversionary value of £300, and the only additional statement the petitioner has made is to the effect that the bankrupt is said to have furniture and implements worth £35.

The petitioner does not explain how the bankrupt acquired this property, and we must of course assume, there being no allegation of fraud, that when the truster was discharged the whole estate then belonging to the bankrupt had been divided, and therefore that he started with nothing. The petitioner does not say how he came to be possessed of property having a reversionary value of £300, or farming implements worth £35, and we must therefore look to the respondent to tell us how the matter stands.

The respondent is trustee in the *cessio* awarded by the Sheriff, upon whom the petition was ordered to be served. He made inquiry into the facts of the case, just as the petitioner might have done, and had furnished us with an explicit statement; and in the absence of any other statement of how the bankrupt came to engage in business, the information supplied by the respondent must be taken as substantially accurate. It amounts to this, that after the discharge of his trustee the bankrupt set up as a farmer, and also traded as a horse-dealer and carter. In this way he made money, and acquired farm stock, and then with the proceeds of what he sold he purchased a piece of ground, upon which he built a house, which forms the heritable property, the balance being just the remainder of the proceeds of the farm stock.

The nature of the acquisition of the property having been thus established, the question is, whether the petitioner, who is one of the creditors in the old sequestration, is entitled to have a new trustee appointed in that sequestration, who would take this property for behoof of the former, and to the exclusion of all subsequent creditors.

No doubt the terms of section 103 of the Act of 1856 are very express, that "If any estate"—and the word estate is by the interpretation clause made to include anything that a man can possess or enjoy—"wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall *ipso jure* fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee." . . . . In the present case the trustee has been discharged, but that did not prevent the application of this part of the statute, enacting that acquired estate shall *ipso jure* fall within the sequestration; for although in the statute there is no provision for the appointment of a new trustee, still we have held that the statute cannot be for that reason defeated, and that it is a mere *casus improvisus*. The right under the statute is unqualified, and the only necessity for an equitable jurisdiction is to supply the machinery for giving effect to it. The right conferred by section 103 is thus a strong one; circumstances, however, may occur to bar creditors from insisting in that right, and the question is whether the present case is not of that nature. In the case of *Taylor* v. *Charteris and Andrew*, one of the cases I suggested as operating so as to bar creditors from insisting was this, "No doubt, if, after his (the trustee's) discharge, the creditors showed no disposition to avail themselves of their rights, and had allowed the bankrupt to keep possession of the estate and deal with it as he pleased, there might in these circumstances, and by lapse of time, have been a bar to their title. So, again, it has been assumed in the decided cases on this matter that if the creditors allow the bankrupt to embark anew in trade, and to acquire a business stock on the footing that he is entitled to enter the market and trade as if *sui juris*, then they may not be entitled to prevent new creditors from ranking on the newly acquired estate." Here the lapse of time is by no means immaterial. It is thirteen years since the trustee was discharged, and although it is not clear how soon the bankrupt started as a farmer and horse-dealer, we must take it to have been about the same time, for it is not said that the bankrupt had any means of

living except that. I think if a bankrupt before getting his discharge is allowed so to engage as a farmer and horse-dealer, his creditors must be assumed to know something about it; they must know something about their undischarged debtor, and yet they made no objection. I think the bar which I contemplated in the case of *Taylor* might arise with regard to property subsequently acquired, comes to apply to the present case. That conclusion is justified, I think, not by express decision, but by what has been assumed in the decisions, namely, that when creditors act in this way they cannot be allowed to come and ask for the appointment of a new trustee, with the effect of excluding all the creditors of the debtor subsequent to twenty years ago. This is a strong case—a special one no doubt—for the application of what has been recognised as a necessary exception to the ordinary rule.

Lord Deas concurred.

Lord Mure—I am of the same opinion. This is an appeal to the *nobile officium* of the Court in order to rear up a sequestration which got out of practical working order by the discharge of the trustee thirteen years ago. The bankrupt is admittedly engaged in trade. During the whole of this time the original creditors stood by and took no steps to get a new trustee appointed, or to interfere with the bankrupt's occupation.

Now, the creditors subsequent to that sequestration apply under the recent Act and get a decree of *cessio* against the bankrupt. I do not think in these circumstances that the old creditors are in a position now to say that the sequestration ought to be revived, so as to get hold of the debtor's estate to the exclusion of the other creditors. In this case I am of opinion that the principle upon which your Lordship observed in the case of *Taylor* v. *Charteris and Andrew* should be applied.

Lord Shand—It seems to result from the decision in *Christie* v. *Lowden* in 1835, and the *dicta* reported in the case of *Taylor* v. *Charteris and Andrew* in 1879, that creditors may be barred from bringing into a sequestration *acquirenda* of the bankrupt, by acquiescence such as your Lordship has described. In *Christie* v. *Lowden* no doubt the statute was in different terms, and the vesting clause had not the same strength, but there, as here, the creditors had to apply to the Court in order to make their right effectual. The property here could not practically be brought under the sequestration without the intervention of the Court, so the two cases do not materially differ.

It is right to observe that the Act recognises that creditors may be barred, for the clause of the statute (sec. 103) provides that the trustee shall "present a petition setting forth the circumstance to the Lord Ordinary, who shall appoint intimation to be made in the *Gazette*, and require all concerned to appear within a certain time for their interest;" and then it goes on, "and after the expiration of such time, and no cause being shown to the contrary, the Lord Ordinary shall declare all right and interest in such estate which belongs to the bankrupt to be vested in the trustee." That recognises the fact that there may be circumstances with reference to the conduct of the creditors which may render them not entitled to exercise their right.

The question remains, if in this case there is a bar to asking the appointment of a new trustee in this sequestration to administer this estate for behoof of the creditors to whom the bankrupt was indebted in 1863, to the exclusion of all who have become his creditors since, and who by giving him credit may have been the means of enabling him to acquire this property? The circumstances are that the sequestration was granted twenty years ago, that the trustee was discharged thirteen years ago, and that since then the bankrupt has been suffered to trade without interference. This being the position of matters, I think the creditors in the sequestration of 1863 are not entitled to revive it I am therefore of opinion that the petition should be refused.

The Court refused the petition.

Counsel for Petitioner—Watt. Agent—David Roberts, S.S.C.

Counsel for Respondent—Gloag—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

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# HIGH COURT OF JUSTICIARY.

*Wednesday, November* 21.

(Before Lords Young, Craighill, and Adam.)

[Burgh Court of Stewarton.

GALLIE AND OTHERS *v.* FERGUSON.

*Justiciary Cases—Conviction—Clerical Error in Sentence.*

A sentence following on a conviction of breach of the peace, bore that the accused "were adjudged to pay the sum of fifteen each of penalty." The accused, after having paid fifteen shillings as the amount of their fine, presented a bill of suspension on the ground that the sentence was defective and inept, inasmuch as the word "shillings" was omitted therefrom. The Court *refused* the suspension.

Robert Gallie, John Brown, David Dickie, Frank Angus, George Brown, and Thomas Maltman were charged before the Magistrates of Stewarton, at the instance of Archibald Ferguson, Procurator-Fiscal, with breach of the peace by cursing and swearing, using obscene language, and shouting aloud, and also by obstructing the police in their duty. They pleaded not guilty, and after evidence had been heard in support of the prosecution and defence, the Magistrates found them all guilty, and adjudged Gallie and Brown "to pay the sum of twenty shillings each penalty, and in default of immediate payment adjudge each of the said Robert Gallie and John Brown to be imprisoned in the prison of Ayr for the period of ten days; and the said David Dickie, Frank Angus, George Brown, and Thomas Maltman, and therefore adjudge each of them to forfeit and pay the sum of fifteen each of penalty, and in default," &c., seven days' imprisonment.

The accused brought this bill of suspension on the ground, *inter alia*, that the sentence was not so